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2.3. Moral rights, a view from continental Europe

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I. Introduction

Moral rights probably represent the quintessence of the traditional *droit d’auteur* system of protection of creators of copyrighted works. Their quasi sacro-saint status may make it difficult to conceive that they would need to be adapted to new market conditions, and specifically to the new on-line environment. However, following the invitation of the organizers of the ALAI conference (which is reflected in the title of the conference) to *revisit* moral rights and in light of the title of the panel enquiring whether there is a clash between theory and practice, this paper will focus on two issues which appear of particular interest and relevance in this context. These issues are the application of moral rights in collective dependent creation processes (see below II) and the remedies for violations of moral rights in the digital on-line environment (see below III).

II. Moral rights and collective dependent creation processes

1. From individual independent creation to collective dependent creation processes

Given that moral rights ultimately mirror the need to protect the personality of the authors and artists, it is not surprising that moral rights are conceived as *individual* rights belonging to *individual* authors and that this individualistic approach is reflected in the relevant copyright regulations.

To start with, and quite interestingly, the Berne Convention seems to operate a distinction between economic rights and moral rights in the sense that the provisions defining and relating to economic rights refer to the “authors” (in the plural form)¹ while Article 6*bis* refers to the “author” (in the singular form)², which may consequently be perceived as a confirmation of the individual nature of the moral rights granted to the authors under the Convention by contrast to the (less individual) economic rights. This individualism does not seem to fit with the current processes by which works are generated in today’s creative economies and so-called “cultural industries”.

¹ See, e.g., Art. 8 (right of translation): “*Authors* of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of *their works* throughout the term of protection of *their rights* in the original works” (emphasis added); Art. 9 para. 1 (right of reproduction): “*Authors* of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form”; see also e.g. Art. 11, 11*bis*, 11*ter* and 12 of the Convention; this is reflected in both the English and the French versions of the Convention, whereby in case of differences of opinion on the interpretation of the various texts, the French text shall prevail (Art. 37 para. 1 c.).

² Art. 6*bis* para. 1: “Independently of the author’s economic rights, and even after the transfer of the said rights, *the author* shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation” (emphasis added).

One feature of today's innovation system is that companies do not create internally but rather rely on the creativity of third parties. More generally, our globalized flat world³ tends to intensify the exchanges and interactions between the market players. It mirrors the movement of open innovation which is characterized by the increased use of third party knowledge and creativity for the purpose of enriching a company's internal innovation (*inbound open innovation*), and by the continuing search of new markets and channels of distribution for the company's own innovation (*outbound open innovation*)⁴.

In a world of open innovation, creativity and innovation do not result from the internal efforts of companies, but rather result from the network⁵. Today's networked and interconnected economy therefore perfectly expresses the paradigm of open innovation⁶.

The intensive interactions between the market players which are at the core of the open innovation ecosystem generally materialize in a multiplication of contractual relationships by which companies integrate in their products and services the intellectual assets (and intellectual property rights) of third parties and also offer their own intellectual assets to the market according to (contractual) rules and principles that they choose⁷. This system makes it possible to capitalize on and benefit from the expert knowledge and experience of other entities, and can therefore contribute to an optimal allocation of corporate and societal activities and resources. These interactions can however create risks which result from the interdependence that such interactions generate⁸.

On this basis, contemporary creation processes are frequently collective and are characterized by the fact that authors join forces in order to create a joint work which had been commissioned by a third party (i.e. the client).

Present legal regulations of moral rights however do not provide for general rules defining the conditions of exercise of moral rights for joint works and

³ By reference to the celebrated book of Th.L. FRIEDMAN, *The World is Flat*, 3rd ed., Farrar, Straus and Giroux, 2007.

⁴ See the classical work of H.W. CHESBROUGH, *Open Innovation: The New Imperative for Creating and Profiting from Technology*, Cambridge (USA) 2003 (and his numerous subsequent publications); see <http://open-innovation.berkeley.edu/>, last accessed 29 October 2014.

⁵ H.W. CHESBROUGH/W. VANHAVERBEKE, "Open Innovation and Public Policy in Europe", *ScienceBusiness*, December 2011, 20 (available at: www.sciencebusiness.net/Assets/27d0282a-3275-4f02-8a3c-b93c2815208c.pdf, last accessed 29 October 2014); "The locus of innovation is no longer in the firm but in the network".

⁶ It is consequently not surprising that the European Union treats open innovation in its "Digital Agenda" program: <http://ec.europa.eu/digital-agenda/en/entrepreneurship-innovation/open-innovation> (last accessed 29 October 2014); see, the report of J. VALLAT, "Intellectual Property and Legal Issues in Open Innovation in Services", *European Commission Information Society and Media 2009*, available at: <http://ec.europa.eu/digital-agenda/en/news/intellectual-property-and-legal-issues-open-innovation-services>, last accessed 29 October 2014.

⁷ One avenue for fostering accessibility and sharing opportunities being to adopt an open licensing (open content / open source) strategy; open innovation does not necessarily means that the knowledge which is generated is offered for free to third parties under open licensing terms; two categories of open innovation have been identified: open-boundary innovation which is designed to source new technology and concepts broadly without surrendering control of the innovation process, and open-source innovation which is a more radical model that views the source of much innovation as originating in the collective knowledge and motivation of anonymous users, see J. EUCHNER, "The Uses and Risks of Open Innovation", *Research – Technology Management Journal*, 56 (2013) (3), p. 49.

⁸ See J. DE WERRA, "Keeping the Genie of Licensing Out of the Bottle: Managing Inter-Dependence in Licensing Transactions", *IIC* 2014, p. 253 (from which the developments relating to open innovation made in this paper are derived).

during the process of creation of a work, except for specific rules which have been adopted for certain types of works and industries (and specifically for audiovisual works). These regulations consequently do not offer any bright line solutions as to how potential disputes about the exercise of their moral rights on joint works shall be solved. To be sure, joint ownership of copyrights (and more generally of IP rights) is not a new phenomenon. It however remains knowingly complex⁹, particularly in a transnational perspective¹⁰. This is particularly the case of the joint ownership of moral rights for which this issue has remained largely unregulated or even unexplored (subject to the regulation adopted for certain limited categories of complex works and industries, e.g. the audiovisual sector).

It is also quite interesting to note that the same lack of regulation prevails with respect to neighbouring/related rights, i.e. for the rights of performers. This absence particularly appears in the two latest international treaties on performers' rights which do not provide for any specific rule addressing the scenario of joint performances, whereby these treaties, similarly to the Berne Convention (from which they are obviously derived with respect to moral rights), also emphasize the *individualistic* approach relating to the moral rights of performers by referring to “a performer” (singular form)¹¹ by contrast to the economic rights of performers for which the plural form is used (i.e. “performers”)¹². The same individualistic approach is generally adopted under national law¹³.

This may seem quite surprising to the extent that in numerous situations (if not in most of them) the performances protected by neighbouring rights are performed jointly by several performers (which is particularly the case of an orchestra).

These changes in the way how works tend to be created or performed (i.e. outsourced creativity and collective creativity) can generate certain difficulties of application of moral rights.

⁹ See the collective book, J. ROSEN (ed.), *Individualism and Collectiveness in Intellectual Property Law*, ATRIP Intellectual Property series, Edward Elgar Publishing, 2012; see also A. PEUKERT, “Individual, Multiple and Collective Ownership of Intellectual Property Rights – Which Impact on Exclusivity?” in A. KUR / V. MIZARAS (eds), *The Structure of Intellectual Property Law, Can One Size Fit All?*, ATRIP Intellectual Property series, Edward Elgar Publishing, 2011, p. 195.

¹⁰ See, e.g., G. WESTKAMP, “Research Agreements and Joint Ownership of Intellectual Property Rights in Private International Law”, *International Review of Intellectual Property and Competition Law*, [2006] 37(6), p. 637-661.

¹¹ WIPO Performers and Phonograms Treaty (WPPT, 1996): Art. 5 para. 1: “Independently of a performer's economic rights, and even after the transfer of those rights, *the performer* shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation” (emphasis added); Beijing Treaty on Audiovisual Performances (2012): Art. 5 para. 1: “Independently of a performer's economic rights, and even after the transfer of those rights, *the performer* shall, [...]” (emphasis added).

¹² See, e.g., art. 6 WPPT: “Performers shall enjoy the exclusive right of authorizing, [...]” (emphasis added).

¹³ See, e.g., the French Code de la propriété intellectuelle (www.legifrance.gouv.fr/cpi/livre2.htm#2, last accessed 29 October 2014):

Art. L. 212-2: “L'artiste-interprète a le droit au respect de son nom, de sa qualité et de son interprétation. Ce droit inaliénable et imprescriptible est attaché à sa personne. Il est transmissible à ses héritiers pour la protection de l'interprétation et de la mémoire du défunt”.

In short, the focus of legal provisions on moral rights presently is on the regulation of the rights of an *individual* author who creates a work *independently* (i.e. not on the basis of a contract with a third party commissioner). However, today's creation processes are characterized by the creation of works which are the result of the creative efforts of several (joint) authors who have been commissioned (or have been employed) for this very purpose. In other words, *individual independent* creation processes (as reflected in the laws) tend to be replaced by *collective dependent* processes. This consequently invites to revisit moral rights and to assess whether there is a clash between theory and practice.

2. The need to revisit moral rights for collective dependent creation processes

In order to illustrate the potential problems and “clashes” which may arise about the exercise of moral rights in collective dependent creative processes, reference can be made to a recent case decided by the Swiss Federal Supreme Court¹⁴.

The Court decided that a long term contract entered into between two graphic designers and a creative agency under which the designers had assigned their copyrights on fictional graphical animals that they had created to the agency could not be terminated for just cause by the designers even if the animals had been slightly changed by the client (a major Swiss food company) of the creative agency, whereby the client had launched a new food product line for kids based on these animals (under the name “JaMaDu”).

What is interesting in this case is that the Swiss Federal Supreme Court essentially held that the agreement entered into between the two designers and the creative agency could not be terminated by the designers because the client (who had no direct contractual relationship with the designers) had made significant investments in order to use the animals for the new line of food products for kids and should therefore be in a position to continue to use the animals in spite of the minor breaches of the agreement. The Court thus implicitly admitted that the client's dependence over the use of the copyrighted works created by the designers should be taken into account, which in turn had an impact on the assessment of the alleged infringement of the moral rights raised by the designers¹⁵.

What can we learn from this case? It fundamentally illustrates the growing awareness of the *dependence* which can be generated in copyright-related transactions (and more generally in IP transactions). It also demonstrates that courts increasingly perceive the need to protect users of copyrighted works in certain circumstances, thereby reflecting the concern that these users may

¹⁴ Swiss Federal Supreme Court, *sic!* 2013, p. 600 «Roter Vari».

¹⁵ Swiss Federal Supreme Court, *sic!* 2013, p. 603 para. 5.5, the Court indicated that the interests of the client had to be taken into account even if the client was not a party to the agreement between the designers and the agency: “Die Nebenintervenientin agierte als Werbeagentur zwischen den beiden Seiten. Bei dieser Sachlage war es daher nicht nur zulässig, sondern geboten, dass die Vorinstanz bei der Abwägung der Interessen auch das Interesse der Beschwerdegegnerin, dieses breit und langfristig angelegte Kinderprogramm fortführen zu können, in die Gesamtwürdigung aller Umstände einbezog”.

sometimes be extremely (and even excessively) dependent on the use of the copyrighted works which are owned by a third party. This clearly had an impact on the way how the Swiss Federal Supreme Court assessed the claim of infringement of moral rights raised by the designers in this case. The Court considered that the designers could not prevail in their moral rights infringement claim particularly because the designers essentially tried to use moral rights in order to gain new commissions from the agency/the client: their claim by which they requested from the court an order prohibiting any unauthorized changes to the commissioned graphical animals was considered as an attempt to obtain new financial revenues and was thus not in line with the spirit of protection of moral rights (which is, at its core, to protect the extra-patrimonial interests of the authors).

This case law can further serve as the basis of a working hypothesis which can reveal some problems which may result from the application of moral rights in collective dependent creation processes: what if one of the two designers that had been commissioned by the creative agency had ultimately refused to deliver the final work after having received a significant part of the agreed remuneration from the creative agency and if the client had on its side already started to invest in the launch of the new product line for which the work of the designers was to be used.

If we look at this hypothesis through the classical lens of the protection of moral rights, the analysis could be as follows¹⁶: on the basis of the right of first disclosure (“droit de divulgation”), the reluctant designer would keep the freedom to decide whether and when to disclose the unfinished joint work for the first time to the public, even if this may conflict with the interest of the co-author (i.e. the other designer). He could consequently object to the use of the work by the client on that ground. On the basis of his right of integrity (“droit à l’intégrité”), the designer would further have the right to object to any unauthorized changes made to the unfinished joint work (subject to potential additional requirements such as a showing that these changes would be prejudicial to his honor or reputation). The designer would also have the right to exercise his right of paternity (“droit de paternité”) and request that his name shall not be mentioned in connection with the work.

In short, the traditional view would be to hold that the designer should have the right to prevent the use of the unfinished work on the basis of his moral rights.

Now, does this approach reflect an equitable balance of the respective interests which are at stake? Does it rather evidence that there would be a need to revisit moral rights?

If we look at the interests at stake which should be equitably balanced, there is of course the interest of the reluctant designer. But there is also the interest of

¹⁶ While it is obvious that the legal analysis may (potentially significantly) differ from one national copyright law to another, the point here is to highlight that no legal system seems to fully address the issues which are identified in this working hypothesis.

the other designer who has not objected to the use of the joint work as well as the interests of the client and of the commissioning agency that should also adequately be taken into account.

Let us be clear: this type of scenario does not break new ground and is certainly not unheard of. There are indeed already certain regulatory solutions¹⁷ and an interesting body of case law¹⁸ which discuss and delineate the scope of protection of moral rights during the process of creation of the work. What is however still missing is a more systematic approach of this issue (at least from a continental European perspective).

In this respect, reference can be made to the interesting provision which has been drafted in the soft law project of the European Copyright Code¹⁹, which indicates that moral rights remain subject to a test based on a balance of interests and on the proportionality of the protection. Article 3.6 of the European Copyright Code provides that “(1) The moral rights [...] will not be enforced in situations where to do so would harm the *legitimate interests* of third parties to an extent which is *manifestly disproportionate* to the interests of the author” (emphasis added). The question however remains whether a more specific test could be devised in order to address the particular hypothesis that was presented above, which relates to a situation in which a work is created under a contract (i.e. commissioned work).

Interestingly, the European Copyright Code has a provision dealing with works made on commission in its chapter on economic rights. Article 2.6 of the European Copyright Code (“Works made on commission”) states that “[u]nless otherwise agreed, the use of a work by the commissioner of that work is authorised to the extent necessary to achieve the purposes for which the commission was evidently made”²⁰. This provision reflects the well-established principle of the purpose-oriented interpretation of copyright contracts under which, in case of uncertainty, the scope of the transfer of economic rights

¹⁷ See e.g. the solution offered by the Belgian Law on Copyright and Neighboring Rights (of June 30, 1994, as amended by the Law of April 3, 1995) (available at: www.ejustice.just.fgov.be/cgi_loi/loi_a.pl?language=fr&caller=list&cn=1994063035&la=f&fromtab=loi&sql=dt=%27loi%27&tri=dd+as+rank&rech=1&numero=1) which addresses certain aspects of disputes which may arise between co-authors:

“Art. 4. Lorsque le droit d’auteur est indivis, l’exercice de ce droit est réglé par les conventions. A défaut de conventions, aucun des auteurs ne peut l’exercer isolément, sauf aux tribunaux à se prononcer en cas de désaccord.

Toutefois, chacun des auteurs reste libre de poursuivre, en son nom et sans l’intervention des autres, l’atteinte qui serait portée au droit d’auteur et de réclamer des dommages et intérêts pour sa part.

Les tribunaux pourront toujours subordonner l’autorisation de publier l’œuvre aux mesures qu’ils jugeront utiles de prescrire; ils pourront décider à la demande de l’auteur opposant, que celui-ci ne participera ni aux frais, ni aux bénéfices de l’exploitation ou que son nom ne figurera pas sur l’œuvre”;

Art. 16: “L’œuvre audiovisuelle est réputée achevée lorsque la version définitive a été établie de commun accord entre le réalisateur principal et le producteur. Le droit moral des auteurs ne peut être exercé par eux que sur l’œuvre audiovisuelle achevée. Il est interdit de détruire la matrice de cette version”.

¹⁸ See the Dutch case *Loxodrome v. Fortior*, District Court of Maastricht, July 29, 2009 EPT20090729, Rb. Maastricht, available at: www.boek9.nl/items/iept20090729-rb-maastricht-loxodrome-v-fortior (last accessed 29 October 2014); see also the US case: *Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, at 52 (1st Cir. 2010): “We thus hold that VARA protects the moral rights of artists who have ‘created’ works of art within the meaning of the Copyright Act even if those works are not yet complete”.

¹⁹ Available at: www.copyrightcode.eu/ (last accessed 29 October 2014).

²⁰ See previous footnote.

extends to all copyrights which are required in order to achieve the goal of the relevant contract²¹.

This principle generally applies to the transfer (or to the licence) of economic rights (and not to moral rights). It is also supposed to apply to finished works (and not to unfinished works)²².

At present, this principle provides that the use of a *finished* work is authorized (i.e. is covered by the contract) for the purpose that was contractually agreed upon, whereby this authorization to use the work relates to the *economic* rights of the author. Its extension could imply that the use of a finished or of an *unfinished* work is authorized for the purpose which was contractually agreed upon, whereby this would apply to both economic rights *and to moral rights*. The question is therefore whether we could extend its scope and its rationale to contracts relating to moral rights. The extension would consequently have two dimensions: one temporal dimension so that the contractual authorization to use would not be limited to finished works but may already apply to unfinished works and would thus apply before the time when the work is finished. The other dimension would be a substantive one in the sense that the contractual authorization would also cover moral rights and would thus not be limited to economic rights.

Coming back to the hypothesis that was discussed above, it could appear legitimate that the client should have the right to continue to use and to adapt the unfinished graphical work for which the designers have been commissioned even if one of them has objected to such use before the final delivery of their work and before the termination of their agreement subject to certain conditions. This would thus mean that the author would not have the possibility of objecting to the first disclosure of his work and that he would not be in a position to claim that his right of integrity would be violated, so that he would have to tolerate the unauthorized use of his unfinished work.

The balance of interests, in the spirit of the expanded conception of the “*Zweckübertragungstheorie*”, could indeed justify such approach provided that certain conditions are met. One important condition is that the refusal to deliver the final work by the author should constitute a breach of contract. In other words, if the author (in the working hypothesis, one of the designers) refuses to deliver his commissioned work in breach of his contractual obligations (potentially because the agreement provides for a fixed term for delivery), this breach should potentially lead the court to decide that the commissioning party (in the

²¹ This is what has been developed under German copyright law under the so-called “*Zweckübertragungstheorie*”; see sec. 31 para. 5 of the German Copyright Act (of September 9, 1965, as last amended by art. 1 of the law of October 1, 2013) (available at: www.gesetze-im-Internet.de/urhg/_31.html, last accessed 29 October 2014): “Sind bei der Einräumung eines Nutzungsrechts die Nutzungsarten nicht ausdrücklich einzeln bezeichnet, so bestimmt sich nach dem von beiden Partnern zugrunde gelegten Vertragszweck, auf welche Nutzungsarten es sich erstreckt. Entsprechendes gilt für die Frage, ob ein Nutzungsrecht eingeräumt wird, ob es sich um ein einfaches oder ausschließliches Nutzungsrecht handelt, wie weit Nutzungsrecht und Verbotsrecht reichen und welchen Einschränkungen das Nutzungsrecht unterliegt”.

²² For an analysis of the German provision, see Th. DREIER / G. SCHULZE (eds), *Urheberrechtsgesetz: Urheberrechts-wahrnehmungsgesetz, Kunsturhebergesetz; Kommentar*, Beck, München 2008, para. 118 ad § 31.

working hypothesis, the client) would have the right to use the unfinished work. By contrast, if the author had legitimate reasons for refusing or postponing the delivery of the final work, for instance because the other party was in breach of its own obligation (for instance because the other party, namely the client, had not paid the remuneration which was due to the author on the basis of the contract), there is obviously no reason for depriving the reluctant author of the protection of his moral rights against what would appear as an illegitimate use of his work by the client. In other words, the issue of the protection of moral rights will also depend on a careful analysis of the contractual situation at issue.

This framework of analysis makes it possible to integrate a contractual element in the analysis of the conditions and limits of the exercise of moral rights, which appears of high relevance. This scenario can however be quite complex in an international setting because of conflict of law issues: a local author who would have been commissioned by a foreign client under a commission contract governed by foreign law could claim the protection of local copyright law / moral rights in which case the contractual elements governed by foreign law should be integrated and should have an impact on the conditions and limits of the protection of moral rights under the applicable local copyright law.

Another area of uncertainty that can only be briefly mentioned here is about the form and validity of waivers of moral rights which frequently arise in scenarios in which authors create works for third parties, and which materialize the contractual dependence of authors.

In spite of the legal recognition of the existence of waivers of moral rights which are found in certain regulations²³, the legal features of a waiver remain quite uncertain: is a waiver of moral rights a *unilateral* commitment of the author which could then imply that it can be freely (i.e. even without any – legitimate – ground) revoked (i.e. is it revocable at will)? Or is a waiver a contractual obligation of the author which could then be irrevocable or revocable only for just cause? This will once again and obviously depend on the contractual agreement in which the waiver is integrated which can be quite complex in a transnational scenario²⁴.

What seems to emerge from this discussion (which certainly does not aim at offering detailed and global solutions but rather at identifying issues of relevance and of concern) is that there may be a need to revisit moral rights and thoroughly to review the clash between the theory of moral rights and their practice in the face of the growing importance of collective dependent creation processes.

²³ “Renonciation”: art. 1 § 2 Belgian Law on Copyright and Neighbouring Rights (see footnote 17).

²⁴ What about a waiver of moral rights accepted by a local author which would be integrated in an international commission contract governed by foreign law: shall the waiver – as unilateral commitment or as a contractual obligation – be subject to the local copyright law or the foreign contract law (it appears that this issue would be covered by the local moral rights, as *lex loci protectionis*)?

New rules on the exercise of moral rights in a contractual setting should consequently be envisioned, which should cover commissioned works, joint authorship and contractual waiver of moral rights.

III. Remedies for violations of moral rights

Infringement of moral rights can lead to classical remedies consisting of injunctions and of damages (moral prejudice / “tort moral”). Here again, it appears interesting to follow the invitation made by the organization of the ALAI congress to revisit moral rights, and to assess “[t]he changing role of the moral rights in an era of information overload” (which is the subtitle of the conference).

What must be noted from the outset is that the information overload that we face in the Internet age makes it more difficult for authors (as well as for any “content provider”) to gain visibility in this environment, as there is an increased competition for the eyeballs of Internet users. This can also have an impact with respect to the infringements of moral rights in the sense that remedies for infringement of moral rights should enable the authors to benefit from the visibility offered by on-line platforms.

In this respect, traditional (off-line) remedies for infringement of moral rights can generally be considered as reactive/punitive remedies in the sense that their objective is essentially to prohibit a certain behavior in a retrospective and static manner and to impose civil sanctions on the wrongdoer, from which the author generally gains no significant benefit in terms of increased visibility. By way of illustration, a ghostwriter can obtain the right to be named on the new book covers as a result of the violation of his right of paternity/authorship, but gains no major additional visibility from this²⁵.

The issue is whether the on-line interactive environment could make the remedies for infringement of moral rights more beneficial and useful for the authors and whether remedies for violations of moral rights should consequently be revisited²⁶.

Authors and courts could indeed take better advantage of the visibility of on-line media when shaping remedies for infringements of moral rights. By taking the hypothesis of a violation of the right of paternity which would have been committed on an on-line platform (i.e. a work is used on-line without indication of the name of his author), it could be of help if the court judgment shall not be limited to an injunction requesting the indication of the name of the author on the digital work (which would be made available on-line) but shall rather request that a hyperlink shall be added (in the on-line location of the infringing work) and shall point to the official webpage of the author whose right of

²⁵ See Court of Appeal of Paris, *Anne Bragance v. Michel de Grèce*, RIDA 1989 (142), p. 301 (rectification of a book cover for a violation of the right of paternity).

²⁶ For a discussion of the critical role of intermediaries in the on-line enforcement of copyrights, see J. DE WERRA, “Défis du droit d’auteur dans un monde connecté”, *sic!* 2014, p. 194, available at: <http://archive-ouverte.unige.ch/unige:36864/ATTACHMENT01> (on which certain developments made here are based) (last accessed 29 October 2014).

paternity was infringed. By doing so, the author could be put in a position to benefit better from the infringement of his moral rights by increasing his on-line visibility. This may require revisiting the remedies and potentially the very concept of the right of paternity given that the goal would not only be to recognize the right of the author to be identified as the author of a given work (which is the classical approach) but rather to expand it in order to include a right of the author to link or point to his original works (i.e. to point to his website). The same approach and reasoning could also be applied for cases of on-line infringement of the right of integrity in the sense that the author could also benefit from the on-line visibility of the relevant platform on which the infringement was committed in order to promote his own works.

More generally, it would be useful to make court decisions about violations of moral rights more visible “in an era of information overload” (as per the subtitle of the conference).

According to the traditional (off-line) approach, the publication of court decisions is generally made in off-line periodic media (i.e. newspapers). The publicity effect of court decisions is widely recognized and anchored in IP instruments (beyond copyright law), such as the EU Enforcement Directive 2004/48. Recital 27 provides that “[t]o act as a supplementary deterrent to future infringers and to contribute to the awareness of the public at large, it is useful to publicise decisions in intellectual property infringement cases”. Article 15 para. 1 further provides that “[m]ember States shall ensure that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part”.

On this basis, it would appear essential for the authors, their counsel and the courts to maximize the visibility of on-line platforms in order to publicize court decisions about violations of moral rights and to adopt adequate social media campaigns, search engine optimization measures (etc.) to this end.

What is of relevance in this respect is that remedies should be *adapted* to the on-line environment and therefore that they deserve to *be revisited*. An adaptation is indeed required because it will generally not be sufficient simply to replicate the remedies and requests for relief that apply in the off-line environment (i.e. there will be no “copy/paste” of off-line remedies). This is a lesson that can be learnt from a Swiss case (about a defamation committed by a Geneva-based media outlet) in which the request was made to publish on the website of the newspaper the same text as the one requested for the off-line physical copy of the newspaper for a period of six months²⁷. This order however did not make

²⁷ “La publication figurera en première page de la Tribune de Genève en support papier, format 10 cm x 15 cm au moins, [...]; dans le même délai et sans commentaires, *la même publication*, [...], *figurera sur le site Internet du journal* (*‘www.tdg.ch’*), dans lequel ladite publication durera six mois” (Swiss Federal Supreme Court, October 3, 2013, ref. 5A_170/2013 and 5A_174/2013, para. 8).

much sense because it did not necessarily ensure an adequate on-line visibility of the relevant information: merely indicating that a piece of information should remain visible for six months on a given website without specifying where (i.e. at the top the homepage) and under what conditions (size/format etc.) will not be sufficient (it is likely that the information may end up being quickly buried in a subpage of the website).

Courts, authors and their counsel are consequently invited to innovate and to be creative in shaping adequate remedies in case of violation of moral rights committed in the on-line environment.

This is what results from an interesting decision of the High Court of Ireland of May 16, 2013 (*Eoin McKeogh v. John Doe/Facebook/etc.*)²⁸ in which the Court expressly indicated that it “must be imaginative in trying to fashion an appropriate remedy for the plaintiff” (§ 21). In that case, the plaintiff (Eoin McKeogh) was erroneously accused of having used a taxi in Dublin without paying the fare (on the basis of a video on which he could allegedly be identified)²⁹. It however turned out that he was not involved, but it was too late because a virulent on-line media campaign had been launched against him in which he was accused and harshly criticized.

Eoin McKeogh consequently initiated court proceedings in order to remove permanently and on a global basis all the defamatory statements that had been published against him on major global on-line platforms (Facebook, Youtube etc.)³⁰. On this basis, the Court requested the party-appointed experts to work together in order to define the technological measures which should be adopted in order to implement the requested injunction³¹. This case is quite interesting in that it shows that courts should not be reluctant to rely on the technological expertise of the parties in order to design appropriate remedies in on-line infringement cases, which can also be relevant for cases of on-line infringement of moral rights.

The parties and their counsel (and experts) do consequently keep significant control and influence over the crafting of adequate remedies in the on-line environment that the courts will adopt if they appear appropriate. The Swiss Federal Supreme Court recently confirmed that it could be adequate to request the publication of an apology (in the case of an on-line defamation) on Facebook accounts on which the defamatory statements were published³². It could

²⁸ High Court of Ireland of May 16, 2013 (*Eoin McKeogh v. John Doe/Facebook/Google/Youtube/Yahoo etc.*, available at: <http://inform.files.wordpress.com/2013/05/141943409-mckeogh-v-doe-and-others.pdf>, last accessed 29 October 2014).

²⁹ See www.thejournal.ie/eoin-mckeogh/news (last accessed 29 October 2014).

³⁰ High Court of Ireland of May 16, 2013 (see Footnote 153), at § 10: “mandatory injunctive relief so that all material defamatory of the plaintiff arising from the posting of the video clip in question shall be taken down permanently and on a worldwide basis”.

³¹ *Id.*, § 25: “The proposed meeting [of experts] should, if feasible, produce a report for the Court upon which each expert can agree. In that event, the report would set forth what steps are to be taken to achieve the total takedown which the plaintiff requires, or at least what steps are possible to achieve that objective as far as reasonably possible”.

³² See Swiss Federal Supreme Court November 4, 2013, ref. 5A_309/2013.

similarly be appropriate to publish decisions about violations of moral rights by the same channels.

In short, the specificities of on-line media must be used in order to ensure an adequate protection of moral rights in the on-line environment³³.

On-line platforms can and should therefore play a central role in the enforcement of copyright on the Internet and that this can also apply to the enforcement of moral rights.

It must also be emphasized that many on-line platforms offer their own dispute resolution services³⁴, on the basis of which victims of allegedly infringing conducts committed on these on-line platforms can file a (standardized) complaint. It could thus be conceived that these proceedings shall also cover violations of moral rights and shall also offer adequate remedies in cases of infringement. However, as most of the US-based platforms basically apply the legal standard defined under US Copyright law and thus integrate the DMCA take down notice (which make it possible to avoid any risk exposure resulting from the making available of on-line copyright infringing content if they comply with the legal requirements)³⁵, it is most unlikely that a complaint for a case of infringement of moral rights could be successfully submitted by using these on-line complaint mechanisms, given that US copyright law does not protect moral rights beyond limited categories of works of visual arts³⁶ and is thus not applicable for the benefit of authors of digital works in the on-line environment.

On-line platforms enjoy in any case a very powerful position given that they define the rights of Internet users and independently regulate their behaviors by unilaterally defining the criteria which must be met in order to legitimize a claim³⁷. This may call for regulatory action, and may invite governmental bodies (regulators and courts) to ensure a certain control over the way how

³³ On-line media may also be used for other purposes, and specifically in order to electronically serve process and court documents on defendants, see, e.g., *FTC v. PCCare247 Inc.*, No. 12-CIV-7189 (PAE) (S.D.N.Y. March 7, 2013); on this issue, see H. VAN HORN, "Evolutionary Pull, Practical Difficulties, and Ethical Boundaries: Using Facebook to Serve Process on International Defendants", *Pacific McGeorge Global Business & Development Law Journal*, 2013, p. 555.

³⁴ See the Facebook page "Reporting a Violation or Infringement of Your Rights" www.facebook.com/help/contact/208282075858952 (last accessed 29 October 2014); see the Twitter page "How to report violations": <https://support.twitter.com/articles/15789-how-to-report-violations#> (last accessed 29 October 2014).

³⁵ See the Twitter policy (previous footnote): "Unauthorized use of copyrighted material: If you need to report the unauthorized use of your copyrighted material to Twitter, please provide a Digital Millennium Copyright Act (DMCA) takedown notice that includes all of the following information [...]"; see 17 U.S. Code § 512 (c).

³⁶ Pursuant to the definition of a "work of visual art" provided in 17 U.S. Code § 101; the moral rights are protected under 17 U.S. Code § 106A – Rights of certain authors to attribution and integrity.

³⁷ R. FARIS / R. HEACOCK, "Introduction" in U. GASSER / R. FARIS / R. HEACOCK (eds), *Internet Monitor 2013: Reflections on the Digital World, Berkman Center for Internet and Society*, December 2013 <http://ssrn.com/abstract=2366840> (last accessed 29 October 2014), p. 7-8: "Large social media companies are now key arbiters of acceptable speech. They make decisions that determine when and how copyright disputes are handled in cyberspace and are asked to act as watchdogs for human rights and civil liberties on-line".

these systems of complaint should be made available to the Internet community³⁸.

On-line visibility is and will remain essential for authors and creators. The legal on-line ecosystem should therefore take this into account and make it possible for the authors to benefit from the exposure that is empowered by the Internet. It is important to revisit the remedies for violations of moral rights. In the on-line environment, an efficient communication strategy on social media platforms will most likely have a higher value for the authors than the (generally quite modest) amounts that they could claim for their moral prejudice resulting from violations of their moral rights³⁹, it being noted that damages resulting from violations of copyrights generally remain quite limited⁴⁰.

IV. Conclusion

On the basis of these developments, it seems adequate to revisit moral rights in order to ensure that the rules governing the application of moral rights reflect today's market and technological conditions, both in terms of the conditions under which a vast majority of works tend to be created in today's creative environment and also in terms of the characteristics of on-line media. It would however be over-simplistic to consider that we are facing an irremediable clash between theory and practice that could be solved only by a revolution. We should of course have trust in the adaptative capacity of copyright law which has continuously managed to find ways to adapt to new environments and market conditions.

We should further have trust in the wisdom of ALAI which had quite wisely and even in a quite visionary manner duly acknowledged in Resolution on Moral Rights which was adopted following the Congress of Antwerp more than

³⁸ This was particularly visible in the data protection / privacy dispute about Google Street view in which the Swiss Federal Supreme Court imposed to Google the way how Google had to make available to Internet users a form by which they could request to be anonymized on pictures made available via the Google Street View system, see Swiss Federal Supreme Court, ATF 138 II 346, 369, para. 10.6.3:

“Die Beschwerdeführerinnen haben sich jedoch verpflichtet, auf einfache Meldung hin die erforderlichen Nachbesserungen vorzunehmen.

Dazu besteht im Internetauftritt von Street View eine kleine Schaltfläche (‘ein Problem melden’) mit einem Link zur Bezeichnung von Bildern, die Persönlichkeitsrechte verletzen. In Anbetracht der Tatsache, dass ein stark überwiegender Teil der Bilder vor der Publikation im Internet automatisch korrekt anonymisiert wird, erscheint es grundsätzlich vertretbar, dass die restlichen Anonymisierungen erst auf Anzeige hin manuell vorgenommen werden. Dies setzt allerdings voraus, dass die Benutzer gut erkennbar über die Widerspruchsmöglichkeit informiert werden und die zusätzlichen Anonymisierungen effizient und unbürokratisch herbeigeführt werden können. Die zurzeit auf Street View bestehende kleine, kaum erkennbare Schaltfläche zur Meldung von Problemen genügt als Information über die Widerspruchsmöglichkeit nicht. Den Benutzern muss ein gut sichtbarer Link – etwa mit dem klaren Hinweis ‘Anonymisierung verlangen’ – zur Verfügung gestellt werden” (see also paragraph 14.4 of the decision).

³⁹ See the decision of the England and Wales Patents County Court admitting the violation of moral rights of the author of a photography made available in a modified format on an Internet site in which damages were set at £ 50.-) in the dispute *Delves – Broughton v. House Of Harlot Ltd* [2012] EWPC 29 (available at: www.bailii.org/ew/cases/EWPC/2012/29.html, last accessed 29 October 2014).

⁴⁰ On this issue, see the thesis of Y. BENHAMOU, *Dommages-intérêts suite à la violation de droits de propriété intellectuelle. Etude de la méthode des redevances en droit suisse et comparé*, Schulthess, Zurich 2013.

20 years ago⁴¹ that the exercise of moral rights should be governed by a certain flexibility⁴².

The issue today is to specify this standard of flexibility and to define more precisely what criteria shall be taken into account for this purpose and to continue the work of ALAI that was initiated in Antwerp.

⁴¹ ALAI, *Le droit moral d'auteur / The moral rights of the Author*, Antwerp Congress, September 19-23, 1993, Paris 1995.

⁴² "It [the Executive Committee of ALAI] admits, however, that a *certain flexibility* in the application of copyright law with regard to authors' moral rights may be accepted [...]" (emphasis added).